STATEMENT

This is a direct appeal from a final judgment and decree entered on September 1, 1965, by the United States District Court for the Western District of Kentucky at Louisville (R. 56), sitting as a three-judge court specially constituted pursuant to Title 28 of the United States Code, Sections 2284 and 2325, dismissing the complaint of the L&N, as amended, (R. 6-13) which sought to set aside and annul orders of the Interstate Commerce Commission, dated March 1, 1957, July 10, 1957, and October 26, 1961, insofar as those orders provided protection pursuant to the provisions of Section 5(2)(f) of the Interstate Commerce Act (49 U.S.C.A., Section 5(2)(f)) for railroad employees engaged in the operations of the Atlanta Joint Terminals (AJT), a terminal operation of the L&N in Atlanta, Georgia, adversely affected by the merger of the L&N and the Nashville, Chattanooga & St. Louis Railway (NC&StL).

The orders of the Commission, which the L&N sought by its complaint in the District Court to have set aside in part, were entered in an administrative proceeding identified as *Louisville and Nashville Railroad Company, et al., Merger, Etc.* (Finance Docket No. 18845). This proceeding concerned a joint application of the L&N and NC&StL for Commission approval pursuant to Section 5(2) of the Interstate Commerce Act (49 U.S.C.A., Section 5(2)) of the merger of the properties and franchises of the two carriers. (R. 7)

The Association intervened and participated in the proceedings on behalf of the twenty-three standard national and international railway labor organizations

affiliated with the Association and the railroad employees for which these organizations are the duly designated representatives under the Railway Labor Act (45 U.S.C.A., Section 151 et seq.), including employees here involved. The Association opposed the approval of the merger on the ground that the transaction was not consistent with the public interest. In addition, the Association supported adequate employee protective conditions for the benefit of railroad employees affected by the transaction if it was approved by the Commission, including those employees engaged in the terminal operations of the L&N in Atlanta, Georgia, doing business as the AJT. (Exhibit "A" to Amended Complaint, Sheets 64-67).

Section 5(2)(f) of the Interstate Commerce Act imposed a duty on the Commission, as a condition of its approval of the merger application, to "require a fair and equitable arrangement to protect the interests of the railroad employees affected." This statutory provision is quoted in full in Appendix B to the Jurisdictional Statement.

The Commission by its report and order of March 1, 1957, approved the merger and imposed, as a condition of its approval for the protection of employees, the so-called "New Orleans conditions," derived from the Commission's decision in *New Orleans Union Passenger Terminal Case,* 282 I.C.C. 271, and stated its intent that such conditions should extend to and cover railroad employees engaged in the operations of the AJT (Exhibit "A" to Amended Complaint, Sheet 66).[1]

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[1] The Commission's action was formalized in its order of the same date. (Exhibit "B" to Amended Complaint).

In accordance with its established practice, the Commission did not decide whether in fact any particular railroad employee engaged in the operation of the AJT had been or would be adversely affected by the transaction, but left to arbitration any dispute between the parties on such question.

The L&N did not file a petition for reconsideration of the Commission's Report and Order within the 30 days provided therefore by the Commission's rules (49 C.F.R., Section 1.01). Indeed it opposed the subsequent petition of the Atlanta Employees Protective Association (AEPA), composed of employees engaged in the AJT operation, to intervene in the proceeding and obtain better protective conditions. The L&N opposition was based on the ground, *inter alia,* that the employees engaged in the AJT operation were fully protected by the Commission's order.[2]

On July 10, 1957, the Commission issued an order permitting AEPA to intervene, but refused to reconsider the agency's order of March 1, 1957, on the ground that the employees engaged in the AJT operation were fully protected by that order.[3]

Thereafter, on or about August 31, 1957, the L&N consummated the merger thus approved. (Jur. Statement, 2a).

Approximately 16 months after issuance of the Commission's order of March 1, 1957, and a year after the consummation of the merger, the L&N filed with

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[2] Exhibits 1, 1a, and 2 of "Exhibits to Brief of Railway Labor Executives' Association" before District Court, a part of the record certified to this Court; Jur. Statement, 2a.

[3] Exhibit 3 to "Brief of Railway Labor Executives' Association".

the Commission a petition for reconsideration of the March 1, 1957, order insofar as it included therein protection for the employees engaged in the AJT operation.[4] The Commission on February 3, 1959, denied this petition as untimely filed.[5]

Thereafter on March 6, 1959, the L&N filed its original complaint in the District Court to set aside the Commission's orders of March 1, 1957, and July 10, 1957, insofar as those orders provided protection for employees engaged in the AJT operation. (Jur. Statement, 3a).

On June 9, 1959, the Commission, over the objections of the Association, reopened the administrative proceedings to determine the organization and structure of the AJT and the relationship of its employees to the L&N. (Jur. Statement, 2a). After full evidentiary hearings in the reopened proceeding, the Commission's Hearing Examiner on May 17, 1960, issued his report containing the following findings based on the hearing record:[6]

> "1. The Atlanta Joint Terminal is an unincorporated agency created by the Louisville and Nashville Railroad Company and the Atlantic Coast Line Railroad Company jointly, as lessees of the Georgia Railroad; the Atlanta & West Point Railroad Company; and the Louisville and Nashville Railroad Company in its individual interest,

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[4] Exhibit 4 of "Brief of Railway Labor Executives' Association"; Jur. Statement, 2a.

[5] Exhibit 5 of "Exhibits to Brief of Railway Executives' Association".

[6] Exhibit 6 of "Exhibits of Railway Labor Executives' Association".

under terms of an agreement dated April 1, 1907, covering joint use and operation of terminal properties and facilities in Atlanta, Ga.

"2. Employees of Atlanta Joint Terminals are employees of the aforesaid railroad carriers and their lessee organizations, jointly, under the terms of the said agreement of April 1, 1907, and proportionately, in relation to the terminal service provided for each of the aforesaid railroads and the sums contributed by each railroad to pay the expenses of the agency, are employees of each railroad aforesaid, including the Louisville and Nashville Railroad Company.

"3. Report and order herein dated March 1, 1957, modified by incorporating therein by reference the facts, conclusions, and findings contained in the report and order on further hearing in respect of the status of Atlanta Joint Terminals and the employees thereof, and protection of employees affected as an incident to approval of the merger, etc., of The Nashville, Chattanooga & St. Louis Railway into the Louisville and Nashville Railroad Company, et al. Prior report 295 I.C.C. 457".

After briefs and arguments before the Commission, the agency on October 26, 1961, affirmed the Hearing Examiner's findings and the inclusion of the employees engaged in the AJT operation within the scope of the protective conditions. (Exhibit F to Amended Complaint). Subsequently, the Commission considered and denied the L&N petition for reconsideration of its order.

Thereafter, on January 24, 1963, the L&N filed an amended complaint in the District Court to include the Commission's order of October 26, 1961. The As-

sociation intervened in the action and filed an answer to the amended complaint. (R. 17-25). Following briefs and a hearing on the amended complaint, the District Court on August 5, 1965, entered its opinion affirming the Commission's order and dismissing the complaint. (R. 40-50; Jur. Statement, 1a-11a). The District Court's judgment effectuating its opinion was entered on August 9, 1965. (R. 51, 52).

On motion of L&N an amended opinion was entered by the District Court on August 31, 1965, (R. 53-55), and an amended judgment was issued on September 1, 1965. (R. 56).

ARGUMENT

1. The decision of the District Court affirming the Commission's order is plainly correct.[7] The Commission based its conclusion that the railroad employees engaged in the operation of the AJT were entitled to protection as a group pursuant to the provisions of Section 5(2)(f) of the Interstate Commerce Act on the ground that they were joint or common employees of the L&N and the subsidiaries of the L&N engaged in the operation of the AJT, an unincorporated terminal service agency. The Commission's conclusion that the employees involved were joint L&N employees was

[7] This Court has already affirmed the Commission's order of March 1, 1957, approving the merger in a suit involving, *inter alia*, the contentions of some railroad employees that they were not adequately protected. *City of Nashville et al* v. *United States et al*, 155 F. Supp. 98 (D.C. M.D. Tenn., Nashville Div., 1957), aff'd *City of Nashville et al* v. *United States et al*, 355 U.S. 63. The L&N appeared in this case in support of the order.

based on the following findings of fact: (Exhibit "F" to the Amended Complaint, Sheets 12 and 13)

> 1. Article 4 of the agreement of 1907 between L&N and its subsidiaries setting up AJT and providing for its operation designated the employees involved as "joint employees" and "common employees" of the parties;
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> 2. In all litigation over the years involving AJT, the L&N acted as the plaintiff or defendant and described the employees as its employees;
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> 3. L&N had issued its own employee system passes to the employees engaged in the AJT operation;
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> 4. The employees engaged in the AJT operation are covered by the L&N group insurance plan and are described in the certificate issued thereunder as L&N employees.
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> 5. The AJT is neither a corporation or an unincorporated association but simply a name used to describe a terminal service agency. It files no property tax returns or Federal or State income tax returns; it files no annual reports with the Commission; in litigation involving AJT the L&N has described the operation as that of L&N and its subsidiaries "operating yards and terminal facilities at Atlanta under the name and style of Atlanta Joint Terminals"; the AJT telephone number is that of the L&N in Atlanta.
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> 6. The AJT is controlled and operated by L&N and its subsidiaries.

The L&N does not dispute any of these facts. Taken together they clearly support the Commission's conclusions that the AJT is simply a terminal service operation created and performed by the L&N and its

subsidiaries and that the employees involved are joint or common employees of L&N and those subsidiaries.

L&N argues, however, that since the AJT has been treated as a carrier for some purposes, the Commission erred in concluding that the employees involved are joint or common employees of L&N and its subsidiaries. The Commission in its report in the reopened proceeding stated that "While the factors relied upon by Louisville have been considered along with all the facts and circumstances embodied in the record before us, 'we do not regard them as controlling.'" (Exhibit "F" to Amended Complaint, Sheet 11).

The District Court, in affirming the Commission's orders found that "its findings of fact are supported by substantial evidence" and that it was not, therefore, "authorized to disturb the conclusions of this experienced agency of the Government charged with manifold duties in the field of transportation." (Jur. Statement, 11a).

Although the L&N attempts to clothe its appeal in the garment of substantial legal issues, the L&N in substance simply quarrels with the weight the Commission attached to the various factors before it and the judgment rendered thereon. The District Court was plainly correct when it found that the Commission's conclusions were supported by substantial evidence and that no occasion was presented for it to substitute its own judgment for the Commission's balancing of the factors before the agency. *Gilbertville Trucking Co.* v. *United States,* 371 U.S. 115 at page 126 (1962); *New York* v. *United States,* 331 U.S. 284, at page 326 (1947), reh. den., 331 U.S. 866.

Moreover, the Commission's treatment of the AJT employees is consistent with the decisions of Federal courts which have commonly treated employees of railroad service agencies organized and operated in substantially the same manner as AJT as joint employees of the organizing carriers. *McComb* v. *Southern Weighing and Inspection Bureau,* 170 F. 2d 526 (4th Cir., 1948); *Walling* v. *Western Weighing and Inspection Bureau,* 160 F. 2d 47 (7th Cir., 1946); *United States* v. *Pacific Electric Ry. Co.,* 157 F. 2d 902 (9th Cir., 1946), *cert. den.* 330 U.S. 849.

2. The Commission decision was based on the assumption that the agency was precluded from providing protection to the railroad employees engaged in the operation of the AJT pursuant to the provisions of Section 5(2)(f) of the Interstate Commerce Act unless they can be regarded as employees of a carrier which is an applicant or participant in the merger or other Section 5(2), transaction before the Commission. (Exhibit "F" to the Amended Complaint, Sheets 12 and 13). Subsequent to the Commission's decision in this case, the validity of such assumption was subjected to judicial review in a case in which the Commission denied protection to Chesapeake & Ohio Railway employees engaged in the operation of the Main Street Station in Richmond, Virginia, pursuant to an agreement with the Seaboard Air Line Railroad on the ground that the C&O was not a party to the Seaboard transaction before the Commission by which the employees were injured. The Commission's basis for denying protection was unanimously rejected by the reviewing court on the ground that Section 5(2)(f) provides for the protection of "the interests of the railroad employees affected" by the Section 5(2)(f)

transaction without regard to whether their employer is a carrier which is a party to the transaction. *Railway Labor Executives' Association* v. *United States,* 216 F. Supp. 101 (D.C.E.D. Va., 1963).

In its opinion the Court in that case spoke as follows on the application of Section 5(2)(f): (page 102-104)

> "Section 5(2)(f) commands protection of 'employees affected' by the 'transaction'. The 'transaction' here is the acquisition by Seaboard of the use of Broad Street station. The Act does not, as the Commission would say, limit its security to employees of a carrier involved in the transaction. The guardianship is not dependent upon the role of their employer in the transaction. All 'employees affected' are under the aegis of the Act. The only question is whether they are 'affected': Are they touched sufficiently by the transaction? As our recount of the facts will prove, that inquiry is fully satisfied presently by the immediacy of the relation to Seaboard of the complaining Chesapeake employees.
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> "This recital of the facts plainly confirms the Commission's finding that the plaintiff Chesapeake employees at Main were actually affected by the Seaboard transaction. It shows, too, that practically they worked for the Seaboard as well as Chesapeake. Indeed, they were in reality, though not in contract, as much the employees of Seaboard as of Chesapeake. Their engagement and control by Chesapeake alone were arrangements merely for the railroads' convenience; it did not alter the truth that they were Seaboard's personnel as well.
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> "With so immediate a relationship between them and Seaboard, and with the concession that

> Seaboard's transaction did cause them loss of employment, it is hypertechnical to say the individuals suing here were not 'employees affected' within the first provision of § 5(2)(f) supra. In these circumstances the statute is undeniable. No other prerequisite to the enjoyment of the security of the Act is exacted."

The clear language of the first sentence of Section 5(2)(f) upon which this decision rests is reinforced by reference to Section 222(f) of the Communications Act of 1934 (47 U.S.C.A., Section 222(f)), which provides for employee protection in the merger of telegraph carriers. The cited statutory provision specifically provides that in telegraph mergers protection shall be accorded only to an employee of "any carrier which is a party to a consolidation or merger". This statute was passed in 1934. When Congress subsequently enacted Section 5(2)(f) of the Interstate Commerce Act in 1940, it deliberately did not so limit protection of railroad employees in mergers or similar transactions. This Court cited the provisions of the Communications Act in determining the type of protection provided by Section 5(2)(f). *Brotherhood of Maintenance of Way Employes, et al.* v. *United States,* 366 U.S. 169, 175 (1961). In that case, the differences between the two statutes worked against the employees' contention that Section 5(2)(f) required job protection in contrast to financial compensation. Here, the differences between the two statutes clearly support the position that the protection accorded by Section 5(2)(f) is not limited to employees of applicants or carriers involved in a transaction.

This application of Section 5(2)(f) was advanced to the Commission by the Association in the present

case as an alternate basis for according protection to railroad employees engaged in the operation of the AJT and to the District Court as an alternate ground for affirming the Commission's action in according such protection.[8] The Richmond terminal case and the decision quoted above with respect thereto was cited by the District Court in its decision in the present case. (Jur. Statement, 8a, 9a). It constitutes a separate ground for this Court's affirmance of the District Court judgment not dependent upon a finding that the employees involved are joint employees of L&N and its subsidiaries.

3. The L&N on August 31, 1957, consummated the merger approved by the Commission without seeking reconsideration of the conditions imposed by the Commission's order of approval providing employee protection for those employees engaged in the operation of the AJT adversely affected by the merger. Indeed it successfully opposed reconsideration of such order by AEPA on the grounds that such employees were adequately protected by the order. This Court has held that the beneficiary of an agency order approving a merger who consummates and accepts the benefits of the merger is estopped from thereafter seeking to invalidate a condition of such approval. *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, at page 502 (1955); *Callanan Road Improvement Co.* v. *United States*, 345 U.S. 507 (1953). Those decisions are but one of the many applications of the common sense principle that one who accepts the benefits of a transaction is estopped from thereafter

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[8] Exhibit 6 of "Exhibits to Brief of Railway Labor Executives' Association, page 54; R. 17-25.

asserting its invalidity. *American National Bank and Trust Co. of Chicago* v. *Taussig,* 255 F. 2d 765, 769 (7th Cir. 1958), *cert. den.,* 358 U.S. 883; *Burgess* v. *Nail et al.,* 103 F. 2d 37, 44 (10th Cir., 1939) and cases there cited.

The Association has maintained throughout that the L&N was estopped from asserting the invalidity of the Commission's action in protecting the employees here involved by accepting such condition through consummation of the merger. (Exhibit 6 of "Exhibit to Brief of Railway Labor Executives Association," pages 62, 63; R. 17-25) This bar to a judgment in favor of the L&N was not removed by the Commission's action in issuing its order of October 26, 1961, which reaffirmed the original condition in its order of March 1, 1957, approving the merger. A second judgment or order merely reaffirming a first cannot serve as a vehicle to obtain review of the first order. *Federal Power Commission* v. *Idaho Power Co.,* 344 U.S. 17, 20 (1952), *reh. den.,* 344 U.S. 910; *Department of Banking* v. *Pink,* 317 U.S. 268 (1943), *reh. den.,* 318 U.S. 802; *Skowhegan Savings Bank* v. *Securities and Exchange Commission,* 201 F. 2d 702, 705 (D.C. Cir., 1952).

This bar against the L&N action constitutes a third and separate basis for this Court to affirm the District Court's judgment.

CONCLUSION

The Association respectfully submits that upon the basis of the foregoing points and authorities the judgement and decree of the District Court should be affirmed.

Respectfully submitted,

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